Supreme Court, U.S.
FILED
DEC 1 - 1995
OFFICE OF THE CLERK

No. 95-859

In the Supreme Court of the United States

OCTOBER TERM, 1995

THEODORE M. BARBOUR,
PETITIONER,

v.

DYNAMICS RESEARCH CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NORMAN JACKMAN
BBO #248480
Attorney of Record
MARTHA WISHART
BBO #556694
JACKMAN & ROTH
50 Milk Street, 19th Floor
Boston, Massachusetts 02109
(617) 426-2300
Attorneys for Plaintiff

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

44 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the First Circuit err in granting summary judgment to Respondent, even though Petitioner made out a *prima facie* case and presented evidence of pretext from which the trier of fact could have rejected Respondent's proffered reasons, and thus inferred the ultimate fact of discrimination, in conformity with this Court's decision in *St. Mary's Honor Society* v. *Hicks*, 113 S.Ct. 2742 (1993) which held that the elements of a *prima facie* case together with "rejection of the defendant's proffered reason will permit the trier of fact to infer the ultimate fact of discrimination", and thus defeat a motion for summary judgment?[1]

[1] Eight Circuits have accepted the interpretation of *St. Mary's*, which Petitioner asserts is the correct reading of the case and three Circuits have rejected it.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION	2
29 U.S.C. §1140	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

Page

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 6

Anderson v. *Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994) 7

Anderson v. *Liberty Lobby Inc.*, 477 U.S. 242 (1986) . 6

Bodenheimer v. *PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993) 6

Chambers v. *TRM Copy Centers Corp.*, 43 F.3d 29 (2nd Cir. 1994) 7

Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986) 6

Conkwright v. *Westinghouse Electric Corp.*, 739 F.Supp. 1006 (D. Md. 1990), *aff'd*, 933 F.2d 231 (4th Cir. 1990) 5

Corbin v. *Southland International Trucks*, 25 F.3d 1540 (11th Cir. 1994) 8

Dister v. *Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988) 5

Gaworski v. *ITT Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir. 1994) 7

Gavalik v. *Continental Can Co.*, 812 F.2d 834 (3rd Cir. 1987), *cert. denied*, 484 U.S. 979 (1987) 5

Ingels v. *Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994). 8

LeBlanc v. *Great American Insurance Co.*, 6 F.3d 836 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1398 (1994) . 8

Manzer v. *Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994) 7

Mitchell v. *Data General Corp.*, 12 F.3d 1310 (4th Cir. 1993) 6

St. Mary's Honor Society v. *Hicks*, 113 S.Ct. 2742 (1993) ..... *passim*

Seman v. *Coplay Cement Co.*, 26 F.3d 428 (3rd Cir. 1994) 7

Page

Smith v. *Stratus Computer, Inc.*, 40 F.3d 11 (1st Cir. 1994) 6
Washington v. *Garrett*, 10 F.3d 1421 (9th Cir. 1993) . 7
Woods v. *Fiction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994) 9

STATUTES

28 U.S.C. §1254 2
29 U.S.C. §1140 ..... 2, 3, 4, 5

In the
Supreme Court of the United States

OCTOBER TERM, 1995

No. -

THEODORE M. BARBOUR,
PETITIONER,

v.

DYNAMICS RESEARCH CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Theodore M. Barbour, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on August 15, 1995 and the subsequent denial of the Petition for Rehearing on September 5, 1995.

OPINIONS BELOW

The United States District Court for the District of Massachusetts, on cross-motions for Summary Judgment, denied Petitioner's motion, and granted Respondent's motion. (App. 26) The court denied Petitioner's Motion for Reconsideration. (App. 27) On August 15, 1995, the United States Court of Appeals for the First Circuit affirmed that decision, and held that Petitioner had not adduced sufficient evidence of intent to interfere with

his ERISA rights to survive Summary Judgment.[2] (App. 28). The United States Court of Appeals for the First Circuit denied Petitioner's Petition for Rehearing on September 5, 1995. (App. 29).

JURISDICTION

Judgment of the United States District Court was entered on September 27, 1994 and Petitioner's Motion for Reconsideration was denied on November 18, 1994. That judgment was affirmed by the United States Court of Appeals for the First Circuit on August 15, 1995, and the Petition for Rehearing was denied on September 5, 1995. This Court's jurisdiction to consider this petition from the final judgment or decree by a United States Court of Appeals is invoked pursuant to 28 U.S.C. §1254.

STATUTORY PROVISION

The statutory provision involved in this case is 29 U.S.C. §1140 which provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 U.S.C. §1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating

[2] Judge Cyr dissented from the decision.

to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 U.S.C. §1132] shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

Petitioner, an employee of Respondent, attempted to exercise his right to a Medical Leave of Absence. Petitioner had numerous health problems related to alcoholism. Petitioner was given forms to fill out in order to qualify for a Medical Leave of Absence, which was the first step he needed to take to obtain long term disability benefits. Petitioner was not told that there was any particular deadline for returning the forms. At the time Petitioner went on the Medical Leave of Absence, he did not anticipate having any difficulty obtaining certification of his disability because he was under the care of a specialist for a bleeding problem. When he brought the forms to the specialist's office, he was informed that the doctor was on vacation. Petitioner informed Respondent of this development, and each of the following problems he had in obtaining certification of his disability. Upon the specialist's return from vacation, he erroneously informed Petitioner that the forms had to be filled out by a general practitioner. Petitioner did not have a general practitioner, and since the events in question took place during mid-December, 1987 through early January, 1988, the holidays added to his difficulties in obtaining the requisite documentation. Petitioner returned the forms approximately one month after they were given to him. Petitioner had been in contact with Respondent at all relevant times regarding the status of his efforts to obtain documentation of his disability and Respondent continually encouraged Petitioner to pursue the certification. Nevertheless, Petitioner was terminated for the sole reason that he failed to return the forms within ten days of the start of his leave of absence. Termination ended his right to receive his ERISA protected benefits. Petitioner's work performance has never been an issue in this case. Petitioner was never informed of such a deadline when he was given the forms, nor was he

informed of such a deadline during any of the conversations he had with Respondent in the month during which he was working on getting documentation of his condition. Moreover, nowhere in any of Respondent's written policies does it state that an employee may be terminated for failing to return Medical Leave of Absence Forms within ten days of the start of an employee's leave. Respondent stated in deposition testimony that it was "Company Practice" to terminate an employee who failed to meet the deadline. The evidence showed, however, that Respondent was the only person ever to be terminated under this "practice" even though many employees had returned their forms beyond the ten day period. Not only were those employees not terminated, but they were granted benefits.

Petitioner therefore asserted that he was terminated in violation of his rights under ERISA, 29 U.S.C. §1140. Despite the evidence presented by Petitioner, the District Court and the United States Court of Appeals ruled that Petitioner had not presented sufficient evidence of intent to interfere with his benefits to survive Summary Judgment.

REASONS FOR GRANTING THE WRIT

Petitioner contends that the United States Court of Appeals for the First Circuit has decided a federal question in a manner conflicting with applicable decisions of this Court.

In *St. Mary's Honor Society* v. *Hicks*, 113 S.Ct. 2742, 2749 (1993), this Court held that in a discrimination case:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination.

Because of the difficulty of proving intent in a case under 29 U.S.C. §1140, the *McDonnell Douglas* order of proof is applied in cases brought under the statute where there is no "smoking gun" evidence of intent. *Conkwright* v. *Westinghouse Electric Corp.*, 739 F.Supp. 1006, 1019 (D. Md. 1990), *aff'd*, 933 F.2d 231 (4th Cir. 1990); *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988); *Gavalik* v. *Continental Can Co.*, 812 F.2d 834, 852 (3rd Cir. 1987), *cert. denied*, 484 U.S. 979 (1987). Thus, the decision in *St. Mary's Honor Society* v. *Hicks* is controlling in this case.

Petitioner asserts, and Eight Circuit Courts have held, that the decision in *St. Mary's Honor Society* v. *Hicks*, precludes summary judgment where there is sufficient evidence to conclude that the proffered reasons for the discharge are a pretext. Under the language quoted above, Petitioner believes, that because he established a *prima facie* case and has shown that the employer's reasons are not worthy of credence, no additional proof of intent is required, at the summary judgment stage, to infer that the employer intended to interfere with the employee's benefits, and thus to survive a motion for summary judgment.

Therefore, since Petitioner supplied evidence sufficient to support a *prima facie* case, and to show that the employer's reasons are not worthy of credence, "no additional proof of discrimination is required" for the *trier of fact* to infer discrimination. *St. Mary's Honor Society* v. *Hicks*, 113 S.Ct. 2742, 2749 (1993). The Circuit courts are split on the issue of whether the portion of *St. Mary's Honor Society* v. *Hicks* quoted above prohibits summary judgment where, as here, there is sufficient evidence to conclude that defendant's proffered reasons are a pretext. In the wake of *St. Mary's Honor Society* v. *Hicks*, two distinct positions have emerged regarding the impact of this Court's decision on summary judgment in a discrimination case. The First, Fourth and Fifth Circuits adhere to the most conservative position, holding that when a Plaintiff has shown a *prima facie* case and has introduced evidence raising an issue of fact as to the

veracity of the reason advanced by the employer, nevertheless, unless the Plaintiff introduces additional evidence of discriminatory animus, summary judgment *must* be granted in the employer's favor. *See e.g.*, *Smith* v. *Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994) (to survive motion for summary judgment, plaintiff must adduce evidence not only of pretext, but that reason alleged was pretext for discrimination); *Mitchell* v. *Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (if Defendant advances legitimate explanation, Plaintiff must present evidence that satisfies the ultimate burden of persuasion to avoid summary judgment); *Bodenheimer* v. *PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) (summary judgment must be granted for employer unless Plaintiff shows that proffered reasons are pretexts for discrimination). Petitioner asserts that this position is an incorrect interpretation of *St. Mary's Honor Society* v. *Hicks*.

The majority of Circuits have interpreted *St. Mary's Honor Society* v. *Hicks* to mean that if the Plaintiff presents a *prima facie* case of discrimination, and raises a material issue of fact regarding the truth of the reason advanced by the employer for the discharge, summary judgment for the employer cannot be granted. The basis for this position lies in the summary judgment standard itself. A motion for summary judgment cannot be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment in favor of the movant as a matter of law. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986). The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In assessing the record to determine whether there is a genuine issue to be tried, the court is required to draw all factual inferences in favor of the party against whom summary judgment is sought. *Anderson* v. *Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986). This Court stated, in *St. Mary's*, that if the Plaintiff produces evidence of pretext at trial,

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [n]o additional proof of discrimination is required.

St. Mary's Honor Society, 113 S.Ct. at 2749. This language, combined with the proposition that inferences must be drawn in favor of the non-moving party when considering a motion for summary judgment, compels the conclusion that the majority of the circuits have reached: when a Plaintiff has shown a *prima facie* case and evidence of pretext, the court must draw the inference that the real reason is discrimination, and deny the employer's motion for summary judgment. *See Chambers* v. *TRM Copy Centers Corp.*, 43 F.3d 29, 40 (2nd Cir. 1994) (where issues of fact were raised regarding alleged nondiscriminatory reasons, summary judgment was inappropriate); *Seman* v. *Coplay Cement Co.*, 26 F.3d 428, 433 (3rd Cir. 1994) (evidence of pretext requires that case be submitted to jury for credibility assessment); *Manzer* v. *Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) (*prima facie* case plus evidence of pretext sufficient to allow jury to determine whether discrimination has occurred); *Anderson* v. *Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) (at summary judgment stage, employee must only produce evidence from which factfinder could infer company lied about proffered reasons); *Gaworski* v. *ITT Commercial Finance Corp.*, 17 F.3d 1104, 1109 (8th Cir. 1994) (elements of *prima facie* case together with sufficient evidence for rational factfinder to reject defendant's proffered reasons is sufficient to submit case to jury); *Washington* v. *Garrett*, 10 F.3d 1421, 1433 (9th Cir.

1993) ("there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's action is true."); *Ingels* v. *Thiokol Corp.*, 42 F.3d 616, 622 (10th Cir. 1994) (if plaintiff presents *prima facie* case and evidence of pretext, case should go to the jury); *Corbin* v. *Southland International Trucks*, 25 F.3d 1540, 1550 (11th Cir. 1994) (at summary judgment stage, if employer articulates legitimate business reason, plaintiff must raise issue of fact as to whether reason is pretext). Plaintiff asserts that this interpretation of *St. Mary's* is the correct interpretation. Moreover, if Petitioner had brought his case in the any of the eight Circuits cited above, his case would have been submitted to a jury.

The First Circuit adheres to an incorrect and unduly harsh standard which requires that, *on summary judgment* a case such as Petitioner's must fail because there was no showing of discriminatory intent. The United States Court of Appeals for the First Circuit stated in its opinion "whether the plaintiff relies solely on his *prima facie* case and evidence of pretext or has additional evidence of specific intent as well, the plaintiff must always adduce evidence sufficient for a rational jury to conclude that the employer's action was motivated by an intent to interfere with ERISA benefits." (App. 11).

But *St. Mary's* holds that where the proffered reason is found to be false, the *trier of fact* may infer the ultimate fact of intentional discrimination. It therefore follows that the Court may not take the issue away from the jury by granting summary judgment to the employer. In ruling on a motion for summary judgment, the court is required to draw all inferences in the non-movant's favor. *LeBlanc* v. *Great American Insurance Co.*, 6 F.3d 836, 841 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1398 (1994). The First Circuit, contrary to *St. Mary's*, refuses ever to draw an inference of discrimination at the summary judgment stage based solely on evidence of a *prima facie* case and pretext.

Under *St. Mary's*, no additional proof of discrimination is *required* where, as here, the facts are so egregious that the

only conclusion which can be drawn from them is that the employer intended to discriminate. The First Circuit pays lip service to the above proposition, stating:

> the Supreme Court envisioned that some cases exist where a *prima facie* case and the disbelief of pretext could provide a strong enough inference of actual discrimination to permit the factfinder to find for the plaintiff. Conversely, we do not think that the Supreme Court meant to say that such a finding is always permissible. . . . The strength of the *prima facie* case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances.

Woods v. *Fiction Materials, Inc.*, 30 F.3d 255, 261 n.3 (1st Cir. 1994). Petitioner does not know of a single case where the First Circuit has found that the combined strength of the *prima facie* case and a pretextual reason for discharge, no matter how egregious, was sufficient to carry a Plaintiff over the Summary Judgment hurdle.

CONCLUSION

In the instant case, Petitioner presented a *prima facie* case and sufficient evidence to discredit the employer's proffered reason. Respondent's actions deviated so extremely from its normal procedure that a trier of fact should have been allowed to weigh the evidence, and determine if the facts themselves indicate discriminatory animus. Therefore, as stated above, the court erred in granting summary judgment in Respondent's favor.

Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the challenged decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted, November 30, 1995

NORMAN JACKMAN
BBO #248480
Attorney of Record
MARTHA WISHART
BBO #556694
JACKMAN & ROTH
50 Milk Street, 19th Floor
Boston, Massachusetts 02109
(617) 426-2300
Attorneys for Plaintiff

United States Court of Appeals
For the First Circuit

No. 94-2283

THEODORE M. BARBOUR,

PLAINTIFF, APPELLANT,

v.

DYNAMICS RESEARCH CORPORATION,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, *U.S. district Judge*]

Before
TORRUELLA, *Chief Judges*,
CYR and STAHL, *Circuit Judge*.

Norman Jackman with whom *Martha M. Wishart* and *Jackman & Roth* were on brief for appellant.
Joan Ackerstein with whom *Guy P. Tully* and *Jackson, Lewis, Schnitzler & Krupman* were on brief for appellee.

August 15, 1995

STAHL, *Circuit Judge*. Plaintiff Theodore M. Barbour sued his former employer, Dynamics Research Corporation ("DRC"), claiming that DRC terminated his employment to avoid paying disability benefits, in violation of section 510 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1140. The district court granted summary judgment for DRC, and we affirm.

I.
FACTUAL BACKGROUND

In July 1985, DRC, an Andover, Massachusetts company, hired Barbour as a staff engineer. Although Barbour was performing his job satisfactorily, his supervisor, Earl Zimmerman, began to complain to Barbour in September 1987 that Barbour's breath smelled of alcohol. Barbour and Zimmerman discussed Barbour's alcohol problem, and Zimmerman suggested that Barbour apply for a medical leave of absence.

For employees with a medically certified disability, DRC provides company-funded short-term disability benefits. The short-term disability plan provides a disabled employee with up to 75% of his or her salary. After six months elapses, an employee who is still disabled must then apply for long-term disability benefits, which are provided through a funded insurance program.

DRC employees applying for short-term benefits receive two documents. The first, a Medical Leave of Absence Notice (the "Disability Notice") describes the employee's rights and responsibilities under the program and requires certain information and an employee signature.[1] The second form, a Physician's Certification of Disability form (the "Certification Form") is to be completed by the employee's physician and returned to DRC's benefits office. The Disability Notice states that the employee

> must submit a completed Physician's Certification of Disability form (or a comparable note on physician's letterhead). This must be received in the benefits office within 10 days of the date your leave commences or the date of this notice, whichever is later.

The ten-day requirement also appears in a memorandum dated July 1, 1987, from DRC's benefits administrator,

[1] The record does not indicate when and if this form was returned and neither party focuses on this document.

Patricia Nickles, to department managers. The memorandum provides that

> [t]he employee has 10 days from the first day out to submit the signed medical leave letter and written medical certification to the Benefits office. If this timeframe is not met, a time card will not be processed. . . .

On or around December 4, 1987, Barbour went to see DRC's vice president of human resources, John Wilkinson, to discuss the process of applying for short-term disability benefits. During his meeting with Wilkinson, Barbour received an undated Disability Notice and a Certification Form. Barbour claims that Wilkinson told him the Disability Notice was undated in order to give him more time to obtain certification. On December 7, without any apparent employer permission, Barbour commenced his absence from work. On this same day, Barbour brought the Certification Form to the office of Dr. Kenneth Prescott, a hematologist who had been treating him for protracted bleeding. Dr. Prescott was on vacation but his nurse informed Barbour that the doctor would return on December 16 and would complete the form at that time.

On December 10, Nickles sent a certified letter to Barbour, stating that unless the Certification Form was returned to her office by December 18 — eleven days after Barbour commenced his leave — she would assume he had chosen voluntarily to terminate his employment. This letter was never received by Barbour as it was incorrectly addressed. Although Nickles told Barbour about the letter during a December 15 phone conversation, Barbour claims that Nickles did not specifically tell him that he would be terminated if the certification was not received by December 18. Barbour states that Nickles told him that he would be receiving a form letter but that he should not "get shook" and that DRC "will work with you but keep in touch."

On December 16, Dr. Prescott told Barbour that he was unwilling to sign the Certification Form and that it should be taken to a general practitioner. Because Barbour was not

under the care of a general practitioner at that time, he experienced difficulty in obtaining an immediate appointment. Barbour says that he attempted to contact Wilkinson on December 16 to inform him of the delay, but claims that Wilkinson failed to return his phone calls.

On December 22, Wilkinson called Barbour to ask about the status of the Certification Form. After learning that Barbour had yet to set up an appointment with a general practitioner, Wilkinson suggested that Barbour continue his efforts at obtaining certification and told him that "they would try to jump the hurdles." In the meantime, however, Nickles and Wilkinson decided to begin the termination process and on December 22 mailed a certified letter to Barbour stating that his employment was being terminated for failure to comply with the ten-day deadline. This letter too was mistakenly sent to the wrong address and was not received by Barbour until January 10, 1988.

On December 30, Barbour finally saw Dr. Lawrence McCartin, a general practitioner. During the appointment, Dr. McCartin told Barbour that he was suffering from a number of alcohol-related disabilities, including hypertension. Barbour asked the doctor to indicate on the Certification Form that his disability was caused by hypertension as he did not want alcoholism documented in his personnel file. Barbour picked up the completed form from Dr. McCartin's office on December 31 and delivered it to DRC on January 4, 1988, the next business day. The form was stamped by Dr. McCartin and stated that Barbour was disabled "indefinitely" beginning December 18, 1987, due to hypertension.

Upon receipt of the Certification Form, DRC proceeded to review Barbour's disability claim. On January 7, Nickles called Dr. McCartin's office and learned that Dr. McCartin had seen Barbour only once, on December 30, two weeks after Barbour's disability allegedly began. She also learned that Barbour had missed a follow-up appointment with Dr. McCartin scheduled for January 7. DRC claims that, based on these circumstances, along with the fact that Barbour had

not listed alcoholism as the cause of disability, it chose not to accept the form as a valid certification of disability and did not reinstate Barbour. Nickles, in informing Barbour of DRC's decision by letter on January 7, stated:

> Unfortunately, I [Nickles] am unable to consider your claim for disability benefits. As you already know, it was your responsibility to submit this documentation by December 18, 1987. Since we did not receive your paperwork by this deadline, you were considered to have voluntarily terminated your employment with DRC retroactive to December 4, 1987.

The record indicates that Barbour was the first employee ever terminated for failure to submit the Certification Form within ten days and that Certification Forms of other employees were received by DRC after the deadline had elapsed (between three and twenty days late). These employees apparently were not terminated or denied disability benefits. The record also suggests that there were other instances in which employees turned in insufficient Certification Forms and it is not disputed that these employees were allowed to supplement their original forms, even though the ten-day period had expired.

After Barbour was terminated, he sought no medical treatment for a period of nine months. In August 1988, Barbour stopped drinking but continued to suffer from a number of alcohol-related illnesses. On April 5, 1991, the Social Security Administration adjudicated Barbour to have been disabled since December 4, 1987, the approximate date that his absence from work commenced.

In June 1992, Barbour commenced this action in Massachusetts state court under section 510 of ERISA, 29 U.S.C. § 1140, alleging that DRC terminated him in order to deprive him of disability benefits. DRC subsequently removed the case to the United States District Court for the District of Massachusetts. At the close of discovery, both parties moved for summary judgment. The district court granted DRC's motion, and Barbour thereafter filed a motion to reconsider. Upon the

district court's refusal to reconsider, this appeal ensued.

II.
DISCUSSION

A. *Summary Judgment Standard*

As always, we review a grant of summary judgment *de novo*. Like the district court, we view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Woods* v. *Friction Materials, Inc.*, 30 F.3d 255, 259 (1st Cir. 1994). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). As a prerequisite to summary judgment, a moving party must demonstrate "an absence of evidence to support the non-moving party's case." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who "may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

Even in an ERISA case "where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Goldman* v. *First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993) (quoting *Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990)). Thus, Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment . . . upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

B. *Proving an ERISA section 510 Case*

1. The Legal Framework

Section 510 of ERISA provides in part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . *for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan* . . . .

29 U.S.C. § 1140 (emphasis supplied). The ultimate inquiry in a section 510 case is whether the employment action was taken with the specific intent of interfering with the employee's ERISA benefits. *Clark* v. *Coats & Clark, Inc.*, 990 F.2d 1217, 1222 (11th Cir. 1993); *Biggins* v. *Hazen Paper Co.*, 953 F.2d 1405, 1417 (1st Cir. 1992), *vacated and remanded on other grounds*, 113 S.Ct. 1701 (1993); *McGann* v. *H & H Music Co.*, 946 F.2d 401, 404 (5th Cir. 1991). This "specific intent" requirement derives from the language of the ERISA statute ("for the purpose of interfering") and is necessary "to separate the firings which have an incidental, albeit important, effect on an employee's . . . rights from the actionable firings, in which the effect of the firing on the employer's . . . obligation was a motivating factor." *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988). Thus, no ERISA cause of action will lie where the loss of benefits was a mere consequence of, but not a motivating factor behind, a termination of employment. *Id.* Without such a requirement, every discharged employee could have a potential claim against his or her employer.

In most cases, given that the employer controls the evidence related to intent, a plaintiff will be unable to adduce "smoking gun" evidence that the employer intended to interfere with his or her benefits. An employer is unlikely to document such a motive, and there is rarely "eyewitness testimony as to the employer's mental processes." *Dister*, 859 F.2d at 1112 (quot-

ing *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983)). Therefore, a plaintiff usually must rely on circumstantial evidence to prove his or her case.

Where a plaintiff must resort to such evidence, the burden-shifting analysis used in Title VII employment discrimination cases is especially helpful. It "enables the trial judge to sift through the evidence in an orderly fashion to determine the ultimate question in the case — did the defendant discriminate against the plaintiff." *Dillon* v. *Voles*, 746 F.2d 998, 1003 (3d Cir. 1984). Accordingly, a number of circuits have applied the *McDonnell Douglas* framework to section 510 claims. *See, e.g.*, *Humphreys* v. *Bellaire Corp.*, 966 F.2d 1037 (6th Cir. 1992); *Rath* v. *Selection Research, Inc.*, 978 F.2d 1087 (8th Cir. 1992); *Conkwright* v. *Westinghouse Elec. Corp.*, 933 F.2d 231 (4th Cir. 1990); *Dister*, 859 F.2d at 1108; *Gavalik* v. *Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987). The district court appropriately employed the framework in this case, and we now do the same in assessing the propriety of the court's grant of defendant's motion for summary judgment.

a. *Prima Facie Case*

In order to establish a prima facie case under section 510, a plaintiff must present sufficient evidence from which the employer's specific intent to interfere with the plaintiff's benefits can be inferred. *Dister*, 859 F.2d at 1114-15. Thus, a plaintiff must show that he or she (1) is entitled to ERISA's protection, (2) was qualified for the position, and (3) was discharged under circumstances that give rise to an inference of discrimination. *Id.* at 1115. As in the Title VII context, the plaintiff's burden of proof at this stage is *de minimis*. *Id.* at 1114-15.

Applying this standard to the instant case, Barbour has met his initial burden of producing evidence to support each of the elements of his prima facie case. First, Barbour is a member of the protected class under the ERISA statute because he had the opportunity to attain a right under an employee benefit plan. Second, Barbour has provided evi-

dence that he was performing satisfactorily in his job. DRC's performance evaluations indicate that Barbour met the characteristics of a "fully qualified experienced employee." Finally, Barbour was attempting to obtain disability certification when the employment action was taken and benefits, if granted, would have been paid from defendant's general funds. As the plaintiff's burden at the prima facie stage is *de minimis*, these circumstances are sufficient to give rise to an inference that DRC terminated Barbour in order to interfere with his disability benefits. *See Dister*, 859 F.2d at 1114 (plaintiff's discharge four months before certain pension benefits were due to vest, together with the substantial cost savings to the employer in denying pension benefits, were sufficient to raise an inference of specific intent at the prima facie stage); *Zappia* v. *Nynex Information*, No. 90-11366-Y, 1993 WL 437676, at *3 (D. Mass. Oct. 22, 1993) (employee's discharge while receiving disability benefits gives rise to a presumption of intent at the prima facie stage).

b. *Defendant's Non-Discriminatory Reason*

Once the plaintiff establishes a prima facie case, a presumption arises that the defendant acted unlawfully in denying the plaintiff ERISA benefits. *See St. Mary's Honor Ctr.* v. *Hicks*, 113 S.Ct. 2742, 2747 (1993) (Title VII). In Title VII cases, "[t]his presumption 'places upon the defendant the burden of producing an explanation to rebut the prima facie case — i.e., the burden of producing evidence that the adverse employment actions were taken for a legitimate, non-discriminatory reason." *Udo* v. *Tomes*, No. 94-1931, slip op. at 7 (1st Cir. Apr. 28, 1995) (uoting *Hicks*, 113 S.Ct. at 2747). In the ERISA context, this burden remains the same. *Dister*, 859 F.2d at 1115. Thus, the defendant must establish a legitimate, "non-discriminatory" reason — i.e., one unrelated to the plaintiff's entitlement to ERISA benefits — for its actions toward the plaintiff.

DRC claims that it terminated Barbour for failing to report to work or submit any medical certification of disability within ten days of the commencement of his leave. Although

Barbour disputes the veracity of this justification, it is enough to satisfy DRC's "relatively light" burden. *Fuentes* v. *Perskie*, 32 F.3d 759, 763 (3d Cir. 1994). As the Supreme Court stated in *Hicks*, "the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily *precedes* the credibility assessment stage." 113 S.Ct. at 2748 (emphasis in original).

c. *Barbour's Evidence of Pretext and Specific Intent*

Once the defendant has met its burden of production, the presumption of intent established by the plaintiff's prima facie case "drops out of the picture." *Hicks*, 113 S.Ct. at 2749. The burden of production shifts back to the plaintiff, who must prove that the defendant acted with the specific intent of interfering with the plaintiff's benefits. *Id.* Thus, in order to survive a motion for summary judgment, a plaintiff must introduce evidence sufficient to support two findings: (1) that the employer's articulated reason for its employment actions was a pretext; and (2) that the true reason was to interfere with the plaintiff's receipt of benefits. *See Udo*, slip op. at 8 (citing *Smith* v. *Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1958 (1995)).

Barbour argues that *Hicks* precludes summary judgment where there is sufficient evidence to conclude that the defendant's proffered reasons are a pretext. Barbour contends that under *Hicks*, where the plaintiff has established a prima facie case and has shown that the employer's reasons are not worthy of credence, no additional proof of intent is required for the trier of fact to infer that the employer intended to interfere with the employee's benefits. Barbour bases his argument on the passage in *Hicks* in which the Court stated that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, 113 S.Ct. at 2749. Barbour's argument, however, was foreclosed

by our decision in *Woods*, in which we interpreted the quoted passage from *Hicks* to make clear

> that the Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of pretext could provide a strong enough inference of actual discrimination to permit the factfinder to find for the plaintiff. Conversely, we do not think that the Supreme Court meant to say that such a finding would always be permissible. . . . The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances.

Woods, 30 F.3d at 261 n.3. Thus, whether the plaintiff relies solely on his prima facie case and evidence of pretext or has additional evidence of specific intent as well, the plaintiff must *always* adduce evidence sufficient for a rational jury to conclude that the employer's action was motivated by an intent to interfere with ERISA benefits. Because Barbour relies largely on the same evidence to prove both pretext and specific intent, we now assess the sum of that evidence and explain why it is insufficient to carry Barbour's burden.

Barbour points to several facts both disputed and undisputed that he claims could lead a reasonable juror to infer that DRC's motivation was to interfere with his receipt of disability benefits. Barbour contends that he was deliberately led into a situation in which DRC could use a nonexistent rule to terminate him. As evidence of this, Barbour points to Wilkinson's provision of an undated Disability Notice on December 4 in order to give him more time to obtain certification, Nickles's alleged failure to state specifically that the Certification Form had to be returned by a particular date,[2] and Wilkinson's instruction to Barbour on December 22 that he

[2] DRC disputes this allegation and claims that Nickles told Barbour on two occasions that the Certification Form was due in the benefits office by December 18. Even Barbour concedes that Nickles told him to return the form "as early as possible." Because this is a motion for summary judgment, however, we will review the facts in the light most favorable to Barbour.

should continue with his efforts to obtain certification despite his difficulties. We fail to see how a rational jury could conclude from these facts that DRC deliberately misled Barbour into believing he could take as much time as he needed to submit the Certification Form. No reasonable employee would assume that he or she had an *unlimited* time period in which to justify an absence. Here, the Disability Notice Barbour received stated very clearly that a certification of disability had to be provided no later than ten days from the date of the form or the commencement of the leave, whichever was later. Since the Disability Notice was undated, Barbour had unequivocal notice that his ten-day period began to run on December 7, when he voluntarily commenced his leave. That Wilkinson and Nickles told Barbour to continue with his certification efforts when it was apparent that he could not comply with the deadline does not in any way indicate a deliberate plan to mislead; to the contrary, it demonstrates that they were still willing to consider his claim. Barbour's own account of his conversation with Wilkinson on December 22 indicates that Wilkinson essentially told Barbour that DRC would see what it could do although he made no promises.[3]

---

[3] With respect to our dissenting brother, his characterization of this conversation is but one in a series of skewed presentations of the evidence that, taken together, he argues would permit a rational jury to conclude that DRC managers conspired to "induce" Barbour to take medical leave and "lull" him into believing there would be no consequences for failing to return the medical forms on time. First, the dissent suggests that DRC had approved a "medical disability leave" when Barbour voluntarily began his absence from work on December 7. *Infra* at 24. Although DRC provided Barbour with the proper forms, the record contains no support for the inference that Barbour's absence beginning on that day was approved or induced by DRC. Our brother finds further support for his conspiracy theory in the fact that on December 22, Barbour was "*told* [by Wilkinson] *to continue to seek medical certification.*" *Infra* at 26. Barbour's own notes, however, state that Wilkinson actually told him that he should "keep going with the Dr. certificate *and they would try to jump hurdles,*" and that "we will see if we can salvage this thing." Wilkinson's choice of words belies Barbour's assertion that DRC soft-pedaled the trouble he was in. The assertion is further belied by Barbour's own notes of his conservation with Nickles on

Barbour also argues that the fact that the penalty of termination for failure to comply with the ten-day deadline is not stated in any of DRC's written policies is evidence that DRC fabricated the "policy" in order to interfere with his benefits.

December 15, in which he recorded that Nickles told him that he should not "get shook" by the form letter she had sent him, and by Barbour's December 18 message for Nickles in which he told her that he did not want to terminate. *See infra* at 25. Why should Barbour "get shook" at all by a form letter unless he knew it contained some kind of ominous warning? And, if Barbour had *no idea* that he was flirting with termination on December 18, why did he leave a message for Nickles stating that he did "not want to terminate"? The particular inferences the dissent would permit the jury to draw from this (and other) evidence — that DRC lured an unwary Barbour into a bureaucratic trap — are patently unreasonable on this record.

Similarly misleading is the dissent's suggestion that DRC's misaddressing of the December 10 letter to Barbour, and, in the dissent's underlined language, the fact that Nickles *"did [not] ask for Barbour's correct mailing address"* when she spoke to him on December 15, were evidence of nefarious doings. *Infra* at 24 n.1, 25. The December 10 letter was addressed to Barbour at "P.O. Box 215, 88 Rogers." He had apparently stopped using the postal box; the street address, however, was correct. One cannot *rationally* infer from this that Nickles *intended* that Barbour would not receive the letter; the fact that Nickles put *both* addresses on the envelopes — with at least a reasonable probability that the postal service would direct the envelope to the correct address — is mighty strong evidence of mistake and not deliberation. That Nickles failed to ask for Barbour's correct mailing address, simply in light of the fact that a letter sent a few days earlier had not arrived yet, is of even less evidentiary value; it proves absolutely nothing.

To cite a final example of the dissent's indefensible inference-drawing, we are at a loss to understand what possible weight is added to Barbour's case by the statements of Wilkinson's secretary to Barbour on December 31. *Infra* at 26. The dissent cites this as a "vicarious admission," but of what? Even assuming that the secretary's statements concerned matters within the scope of her employment, what permissible negative inference could a rational jury draw from the fact that DRC "evinced its readiness to receive the medical form" even after Barbour had been formally terminated? Whatever inferential leap our brother is making here escapes us.

Contrary to the dissent's characterization of our holding, we do not mean to imply that the total assemblage of evidence *compels* a particular conclusion; rather, we hold that the conclusion that Barbour would have a *rational* jury draw — namely, that DRC set Barbour up to apply for medical leave so that it could fire him, and then lied about it — is impermissible based on this evidence.

In support of this argument, Barbour directs us to the undisputed fact that he was the first employee ever terminated by DRC for failing to comply with the deadline. In addition, Barbour presents Certification Forms of other employees submitted after the deadline had elapsed and there is no evidence indicating that these employees were terminated or denied disability benefits for their late submissions.

Even viewing the facts in the light most favorable to Barbour, we agree with the district court that at most these facts show that DRC may have acted inconsistently in its application of the policy regarding employees who turned in their Certification Forms late. Such evidence, standing alone, is insufficient to demonstrate intent unless the inconsistent application is linked with a motivation to deprive the employee of benefits. *See, e.g., Fong* v. *American Airlines, Inc.*, 626 F.2d 759, 762 (9th Cir. 1980); *Teumer* v. *General Motors Corp.*, 840 F.Supp. 538, 548-50 (N.D. Ill. 1993) (holding that in an action under section 510 of ERISA, the plaintiff cannot show pretext simply by demonstrating that the defendant applied its recall policy in an inconsistent manner, but must adduce facts that allow the court to infer that the defendant had the specific intent of interfering with plaintiff's benefits), *aff'd*, 34 F.3d 542 (7th Cir. 1994).

Here, we do not believe that specific intent can be inferred from the fact that Barbour was the first employee ever terminated for missing the ten-day deadline. The Disability Notice clearly states that an employee *must* provide medical certification within ten days; as we stated above, no reasonable employee would assume that he or she had an unlimited time in which to provide it. The summary judgment record indicates that DRC's decision not to terminate other employees who submitted Certification Forms late were based on extenuating circumstances absent from this case. For example, DRC had previously extended the deadline when an employee's physician contacted DRC and advised it that he or she would be unable to complete the form within the specified time period. Similarly, extensions were also granted where an

employee was hospitalized and unable to complete the form in a timely manner.

In this case, DRC was never contacted by a physician regarding Barbour's illness, and Barbour was not hospitalized. Having received the Disability Notice clearly notifying him of the ten-day deadline, Barbour then failed to obtain an appointment with a physician willing to sign the form until December 30. While the delay in obtaining a doctor's signature may not have been entirely his fault, it was *Barbour's* choice to begin his absence on December 7, without any assurance that he would obtain certification of disability within ten days. By December 22, DRC had not received any certification of disability and Barbour had informed Wilkinson that no future doctor's appointment had been arranged. It was this circumstance that caused DRC to mail the December 22 termination letter to Barbour. An employer need not remain idle indefinitely while an employee is absent without excuse. While DRC may have chosen not to discharge other employees for missing the certification deadline, Barbour's case does not present similar extenuating circumstances and, therefore, specific intent cannot be inferred from DRC's actions. *Cf. Stratus*, 40 F.3d at 17 (Title VII plaintiff alleging disparate treatment must show that he or she was treated differently from persons similarly situated in all relevant aspects).

In addition, DRC's actions when Barbour finally did submit certification make Barbour's claim of unlawful motivation even more implausible. Despite Barbour's failure to comply with express company policy, DRC nevertheless reviewed Barbour's disability claim on January 7. Although the form was submitted over two weeks late, Nickles called Dr. McCartin to inquire about the listed disability of "hypertension." Based on what she learned in that conversation, DRC chose not to accept Barbour's form as a valid certification of disability.[4]

[4] In fact, DRC set forth five justifications for its decision to deny Barbour's disability claim: (1) Dr. McCartin did not see Barbour until December 30, two weeks after the disability allegedly began; (2) the condition listed on the form, "hypertension," was different than the alcohol

Even if DRC was mistaken in its evaluation of Barbour's disability, as long as that determination was in good faith and formed the basis of the decision it is permissible under section 510. *Zappia*, 1993 WL 437676 at *3. Barbour has failed to produce any evidence of bad faith.

Barbour next argues that specific intent can be inferred from the mere fact that DRC knew he was in the process of applying for benefits at the time of termination. It is undisputed that Barbour informed Wilkinson on or around December 4 that he was considering applying for disability leave. It is also undisputed that during their discussion, Barbour and Wilkinson discussed the odor of alcohol on Barbour's breath and the possibility of an alcohol problem. However, these facts add little to Barbour's proof: "[E]ven if [Barbour] could establish that [DRC] knew that [Barbour] definitely planned to apply for . . . disability benefits, he would still be required to offer some evidence that this knowledge somehow influenced" DRC's employment actions. *Corcoran* v. *GAB Business Servs., Inc.*, 723 F.Supp. 966, 971 (S.D.N.Y. 1989). As was the case in *Corcoran*, Barbour has failed to produce any evidence suggesting that the prospect of paying disability benefits influenced DRC's decisions. To the contrary, we find it significant that the option of a medical leave of absence was first suggested by DRC. Barbour's supervisor, Zimmerman, approached Barbour and suggested that he apply for a medical leave to address his alcohol problem. Prior to their discussion, Barbour was unaware that he would even qualify for disability benefits. We think it is highly unlikely that DRC would have suggested such an option if it ultimately intended to deprive Barbour of benefits: DRC had no way of knowing that Barbour would fail to submit the proper documentation.

---

problem or bleeding condition which was expected given Barbour's previous statements to DRC supervisors; (3) Barbour appeared to have been "shopping around" for a physician after Dr. Prescott refused to complete the form; (4) the length of disability (undetermined) did not coincide with medical guidelines; and (5) Barbour failed to keep his follow-up appointment with Dr. McCartin scheduled for January 7.

Barbour finally suggests that a factfinder could infer unlawful intent if DRC imposed criteria on Barbour that were harsher than that imposed on other employees whose illnesses were less likely to lead to permanent long-term disability. Even if such an inference would be permissible, Barbour has produced no evidence that his illness was more likely to lead to long-term disability. In fact, the evidence strongly suggests that DRC would have granted Barbour disability benefits had he submitted appropriate documentation of his alcohol condition. In 1987 and 1988, DRC provided disability benefits to all seventy-six other employees who applied for disability benefits. Of these, at least sixteen employees applied for and received disability benefits for conditions related to the abuse of alcohol.

In sum, we hold that Barbour has failed to present evidence that would enable a reasonable jury to conclude that DRC'S actions were motivated by a desire to interfere with Barbour's benefits.

III.
CONCLUSION

Because Barbour has failed to raise an issue of fact as to whether DRC intended to interfere with his ERISA benefits, the district court properly granted summary judgment in favor of DRC on Barbour's ERISA claim.

Affirmed.

Dissent follows.

CYR, *Circuit Judge (dissenting)*. The court aptly acknowledges, *supra* at p. 15, that an inference of intentional discrimination is "particularly" appropriate where a "finding of pretext is accompanied by a suspicion of mendacity," *Hicks*, 113 S.Ct. at 2749, but then abandons basic summary judgment procedure en route to its holding that fair findings of pretext and suspicion of mendacity are precluded on the present record. Allowed their rightful role, the incumbent requirements that all credibility assessments and fair inferences be indulged favorably to the party resisting summary judgment, *Woodman* v. *Haemonetics Corp.*, 51 F.3d 1087, 1091 (1st Cir.1995), do not admit of the findings the court deems *compelled*.

Conspicuously affected by alcoholism and in poor health, Barbour had used much of his sick leave by December 4, 1987. On that day, his supervisor, Earl Zimmerman, called Barbour aside and asked whether he had considered taking long term medical disability leave ("medical disability leave"). Upon learning that Barbour had never considered it, Zimmerman urged him to do so: "It's a good deal, and I don't see why you shouldn't qualify for it. I really would like to call John Wilkinson [DRC vice-president for human resources] . . . and tell him you are on the way down to see him and do that."

On Zimmerman's advice, Barbour went to see Wilkinson, who handed him an *undated* medical disability leave form to be returned "within 10 days of the date your leave commences *or* the date of this notice, whichever is *later*." (emphasis added). The form itself made no mention that failure to file on time could result in termination, nor did Wilkinson ever mention that it should be returned by a date certain.

On December 7, Barbour went on medical disability leave. Three days later, Patricia Nickles, the benefits administrator for DRC, mailed a certified letter warning that Barbour could be terminated if he did not return the enclosed medical certification form (dated December 10) by December 18. As the

letter was misaddressed, Barbour never received it.[5]

There is no record evidence that DRC had ever terminated or threatened to terminate an employee for failing to comply with the ten-day filing provision. Rather, on at least ten occasions DRC had accepted late medical certification forms. Moreover, this marked the first time that any DRC employee had ever been threatened with adverse action before the ten-day filing period had expired.[6]

On December 15, Barbour called to advise Nickles that he had been unable to return the medical form because his physician had been on vacation. During their conversation, Barbour informed Nickles that he had never received a certified letter dated December 10. In response, Nickles simply reassured Barbour that a "form letter [had been] sent out. Don't get shook. We will work with you but keep in touch." She never mentioned that failure to return the completed form within the next three days could, let alone would, lead to Barbour's termination. Moreover, though she knew Barbour had never *received* the December 10 letter warning that termination could result unless the form were returned by December 18, Nickles neither mailed nor handed Barbour another copy, *nor did she ask for Barbour's correct mailing address.*

On December 16, Barbour's physician, a specialist in hematology, advised him that the certification form should be completed by a general practitioner. Although Barbour left telephone messages with John Wilkinson's office, so informing him, the calls were never returned. Two days later, on December 18 — unbeknownst to Barbour the *deadline* for filing the medical form — he left a telephone message for Nickles: "If you don't reach [me] this morning, [I'll] get to

---

[5] Although DRC had the correct street address, the letter had been addressed to a post office box (as well as a street address) which Barbour had relinquished sometime after he moved in 1984.

[6] On one other occasion, in early 1988, DRC warned an employee nineteen days *after* the ten-day period had elapsed. Thus, the record supports a fair inference that the ten-day provision was being applied inconsistently or selectively at or about the time Barbour was terminated.

you this afternoon. Having trouble getting doctor's signature. *[Don't] want to terminate.*" (emphasis added).

On December 21, *after conferring with Wilkinson*, Nickles telephoned to tell Barbour that he had been terminated for failure to return the medical forms by December 18. During their telephone conversation, Barbour volunteered his correct mailing address. On December 22, Nickles mailed Barbour a notice of *voluntary termination* based on his failure to return the required medical form by December 18. That same day, in the belief that Wilkinson, rather than Nickles, had the authority to act in behalf of DRC, Barbour contacted *Wilkinson* and was *told to continue to seek medical certification*.

On December 30, Barbour was examined by a general practitioner, who diagnosed hypertension. At 9:45 a.m. the following day, Barbour was advised by the doctor's office that the signed medical certification form could be picked up. Barbour immediately *informed Wilkinson*, through his secretary, that the form had been signed. The record is silent as to whether he told the secretary that he did not yet have the form in hand. The secretary told Barbour that was "*fine*" and Barbour should "bring [the] form over today." (emphasis added). Thus, as late as December 31, DRC had evinced its readiness to receive the medical form. *See id.* at 1094 (vicarious admissions by employee).

Barbour did not pick up the form on December 31, due to car trouble. When he called DRC during the afternoon of December 31 to explain the delay, no one answered the telephone. Due to the New Year holiday, the medical certification form was not received by Barbour until January 4, 1988, the next business day. He delivered it to DRC the same day. Yet on January 7, *after conferring with Wilkinson*, Nickles sent a certified letter to Barbour informing him that his claim for medical benefits *would not be considered* because Barbour had failed to comply with the ten-day filing provision.[7] On

[7] Notwithstanding its categorical notification to Barbour that the disability benefits application would not be considered, DRC now contends on

January 10, 1988, Barbour finally received the missent termination letter dated December 22, 1987.

A rational factfinder reasonably could infer from the foregoing evidence that DRC not only induced Barbour to take medical disability leave but that it utilized its hitherto dormant ten-day filing provision as a pretext for terminating Barbour after it had misled and lulled him into believing that the ten-day provision would *not* be enforced as a ground for termination, all in order to avoid liability for an ERISA-based medical disability claim. *See id.* at 1094.

First, short of ignoring the summary judgment prescripts that all credibility assessments and reasonable inferences are to favor Barbour, *see id.* at 1091, it cannot be inferred that Barbour was ever informed, *until after the ten-day period had expired*, that his employment could be — let alone would be — *terminated* for tardiness in filing the medical certification form. On the other hand, the trier of fact reasonably could infer from Barbour's initial conversation with John Wilkinson, at which time Barbour was handed an undated medical certification form, that Wilkinson implicitly assured him that the ten-day provision would not be enforced against him. Such an inference is strengthened by the December 15 statement Nickles made to Barbour, that though a certified letter had been sent to Barbour, he should not "get shook. We will work with you but keep in touch."

Second, even after Barbour was notified that he had been terminated, he received decidedly mixed signals from DRC. Although Nickles informed him that he had been terminated, her *superior* — Wilkinson — as late as December 31 held open the prospect that DRC would accept the medical form. Not until January 10, 1988, when he finally received the misad-

---

appeal that it was considered and rejected on the basis of late submission *and because the disability claim was based on hypertension, not alcoholism*. Should this belated representation be credited by the factfinder, it could buttress the inference that failure to file the form within ten days was not the *true* motive for terminating Barbour. In these circumstances, Barbour need demonstrate no more at summary judgment. *See Woodman*, 51 F.3d at 1094.

dressed December 22, 1987, termination letter, and the January 7 letter informing him that the disability claim application would not be considered, was Barbour unambiguously informed of the consequences of failing to comply with the ten-day provision. By then, of course, it was too late.

Finally, the bald statement in the December 22 termination letter that DRC had *presumed* — based on his failure to return the medical forms — that Barbour had *voluntarily terminated* his employment, notwithstanding his flat advice to the contrary on December 18, *see supra* p. 4, and his ongoing efforts to obtain medical certification at DRC's suggestion, imperatively bespeaks pretext and mendacity with sufficient clarity to demonstrate that the inferences relied on by DRC, and endorsed by the majority, are not *compelled*.[8]

Since it cannot be demonstrated — without indulging impermissible inferences and credibility assessments — that a rational factfinder would be *compelled to find* that DRC *did not* actively encourage Barbour to take medical disability leave before obtaining medical certification, then lull him into the fateful belief that strict compliance with its ambivalent ten-day filing policy would not be enforced, *id.* at 1094-95 (*prima facie* case, combined with showing of pretext and suspicion of mendacity, precludes summary judgment on issue of intentional discrimination); *see generally, Hicks*, 113 S.Ct. at 2749, 2749 n.4 & 2756 (where plaintiff adduces enough competent evidence to support inference of discrimination, the case must go to the trier of fact), *I respectfully dissent.*

---

[8] The spirited argument advanced by the court in defense of the inferences it deems compelled, *see supra* note 3, necessarily presumes that the employer's undeniably ambivalent conduct can only have been activated by the innocent intent and motives ascribed to it by the court — an exercise appropriately reserved for the factfinder.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 93-10221-WGY

THEODORE M. BARBOUR,
PLAINTIFF,

v.

DYNAMICS RESEARCH CORPORATION,
DEFENDANT.

MEMORANDUM AND ORDER

YOUNG, D.J. September 27, 1994

The plaintiff, Theodore M. Barbour ("Barbour"), has brought this action against Dynamics Research Corporation ("Dynamics") alleging that Dynamics willfully discriminated against him by firing him in retaliation for exercising his right to seek disability benefits, all in violation of section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 (1985).

In examining the relevant facts of record in the light most favorable to Barbour, it appears that he has established a prima facie case of discrimination.[1] First, he is covered by ERISA. He was an employee who was performing satisfactorily and who had an opportunity to attain or become eligible for rights under an employee benefit plan.[2] Second, he was

---

[1] The *McDonnell-Douglas* presumptions and shifting burdens of production used in the Title VII context *(see McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802-05 [1973]) are also applied in the context of discriminatory discharge cases brought under § 510 of ERISA. *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988); *Zappia* v. *Nynex Information*, C.A. No. 90-11366-Y, 1993 WL 437676, at *3 (D. Mass. Oct. 22, 1993).

[2] Dynamics protests that Barbour cannot prove he was in fact disabled at the time of his discharge and therefore has failed even to make out a prima facie showing of discrimination. On the other hand, Barbour argues

in the process of applying for such benefits when he was terminated. Third, he was prevented from obtaining disability benefits as a result of his discharge. These facts are sufficient to create an inference that Dynamics terminated Barbour in order to interfere with his medical benefits in violation of federal law. *See Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1114-15 (2d Cir. 1988); *Zappia* v. *Nynex Information*, No. 90-11366-Y, 1993 WL 437676, at *3 (D. Mass. 1993).

Dynamics argues that Barbour's employment was terminated as a result of his failure timely to submit required medical documentation of his alleged disability in violation of employer policy. By *"articulat[ing]* a legitimate nondiscriminatory reason for the employee's termination[,]" Dynamics has carried its burden of production and the presumption of discrimination drops out of the case. *LeBlanc* v. *Great American Ins. Co.*, 6 F.3d 836, 842 (1st Cir. 1993) (emphasis in original) (citation omitted), *cert. denied*, 114 S.Ct. 1398 (1994).

Barbour attempts to rebut Dynamics' proffered explanation by arguing that other applicants for medical leaves of absence were not asked to comply with the deadline and thus Dynamics is lying when it explains that he was fired for returning his documentation late. Demonstrating that an employer's reasons are false, however, is insufficient to prove unlawful discrimination. As the Supreme Court has noted, "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not

---

that under this Court's ruling in *Zappia*, 1993, WL 437676 at *3, the decision of the Social Security Administration to classify him as disabled at the time of his discharge (albeit two years after the fact) should be sufficient at the summary judgment stage to establish a prima facie case. It is unnecessary, however, to resolve this dispute here. Assuming arguendo that Barbour could establish a prima facie case of discrimination, he nevertheless fails to carry the burden of producing evidence that Dynamics' proffered reason for its job action was pretextual and thus his case fails as matter of law. *See infra*.

believable." *St. Mary's Honor Center* v. *Hicks*, 113 S.Ct. 2742, 2751 (1993). Indeed, "[in the First Circuit, we have always required not only 'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus." *LeBlanc*, 6 F.3d at 842-43 (citations omitted). *See also Woods* v. *Friction Materials Inc.*, ____ F.3d ____, 1994 WL 387054 at *3 (1st Cir. Jul. 29, 1994) (holding that "claimant must prove both that the employer's articulated reason is false, and that discrimination was the actual reason for its employment action") (citation omitted);[3] *Lynch* v. *General Motors Corp.*, 1994 WL 129573, at *10 (D. Mass. Feb. 18, 1994) (citing *St. Mary's*, 113 S.Ct. at 2751) (same).

Thus, even viewing the facts in the light most favorable to Barbour, the evidence at most demonstrates that Dynamics inconsistently applied its policy of terminating those employees that turned in their disability forms late. Inconsistent application of a company policy is not enough to demonstrate pretext, however, unless the policy is applied inconsistently on the basis of membership in a protected class. *See, e.g.*, *Fong* v. *American Airlines. Inc.*, 626 F.2d 759, 762 (9th Cir. 1980) (inconsistent enforcement of company policy does not show discrimination unless inconsistency can be linked with a discriminatory motive); *Teumer* v. *General Motors Corp.*, 840 F.Supp. 538, 548-50 (N.D. Ill. 1993) (holding that in an action under section 510 of ERISA plaintiff cannot show pretext simply by demonstrating that defendant applied its recall policy in an inconsistent manner, and that in order to survive summary judgent, plaintiff must adduce facts which allow the Court to infer that defendant had the specific intent of interfering with plaintiff's benefits), *aff'd*, ____ F.2d ____, 1994 WL 484404 (7th Cir. Sept. 7, 1994). In this instance, where other members of the protected class were not fired for

[3] The Court recognizes that *Woods* also supports the proposition that some cases are so factually compelling that proof of pretext warrants an inference of forbidden discrimination without more. *Woods*, 1994 WL 387054, at *7 n.3. This is not such a case.

the same behavior, Barbour has failed to present sufficient evidence that Dynamics' proffered reason is pretextual.

Therefore, because the facts alleged by Barbour, even if believed by the finder of fact, are insufficient to establish a pretext concealing unlawful discrimination, Barbour's motion for summary judgment must be DENIED and Dynamics' motion for summary judgment must be GRANTED.

It is so ORDERED.

WILLIAM G. YOUNG

WILLIAM G. YOUNG
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 93-10221-Y

THEODORE M. BARBOUR,
PLAINTIFF,
v.
DYNAMICS RESEARCH CORPORATION,
DEFENDANT.

PLAINTIFF'S MOTION FOR RECONSIDERATION OF GRANT OF SUMMARY JUDGMENT TO DEFENDANT

Now comes plaintiff, who moves the Court to reconsider its grant of summary judgment to defendant on grounds set forth in the accompanying memorandum.

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail on 10/7/94.

NORMAN JACKMAN

NORMAN JACKMAN, ESQ.
BBO # 248480
MARTHA WISHART, ESQ.
BBO # 556694
50 Milk Street, 19th Floor
Boston, MA 02109
(617) 423-2300
Attorneys for Plaintiff

Dated: October 7, 1994

YOUNG D.J.
MOTION DENIED

WILLIAM G. YOUNG

U.S. District Judge
Nov. 18, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-2283

THEODORE M. BARBOUR,
PLAINTIFF - APPELLANT,

v.

DYNAMICS RESEARCH CORPORATION,
DEFENDANT - APPELLEE.

JUDGMENT

ENTERED: AUGUST 15, 1995

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

s/ FRANCIS P. SCIGLIANO
Clerk

cc: NORMAN JACKMAN, ESQ.
JOAN I. ACKERSTEIN, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-2283

THEODORE M. BARBOUR,
PLAINTIFF - APPELLANT,

v.

DYNAMICS RESEARCH CORPORATION,
DEFENDANT - APPELLEE.

ORDER OF COURT

Entered: September 5, 1995

Upon consideration of appellant's petition for rehearing, It is ordered that the petition be denied.

By the Court:

s/ FRANCIS P. SCIGLIANO
Clerk

cc: NORMAN JACKMAN, ESQ.
MARTHA M. WISHART, ESQ.
JOAN I. ACKERSTEIN, ESQ.
GUY P. TULLY, ESQ.

Direct Recipients:
NORMAN JACKMAN, ESQ.
MARTHA M. WISHART, ESQ.
JOAN I. ACKERSTEIN, ESQ.
GUY P. TULLY, ESQ.